

Def-Int. Ex. 306

**STATE OF TEXAS, ET AL. vs UNITED STATES OF AMERICA, ET AL.  
Stephen Legomsky on 08/01/2018**

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
BROWNSVILLE DIVISION

STATE OF TEXAS, ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	Case No. 1:18-cv-00068
	)	
UNITED STATES OF AMERICA, ET	)	
AL.,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
KARLA PEREZ, ET AL.,	)	
	)	
STATE OF NEW JERSEY,	)	
	)	
Defendant-Intervenors.	)	

THE DEPOSITION OF STEPHEN LEGOMSKY

Taken on behalf of Plaintiffs

August 1, 2018

HUSEBY GLOBAL LITIGATION  
1230 WEST MOREHEAD STREET, SUITE 408  
CHARLOTTE, NC 28208  
(800) 333-2082

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2

3     WITNESS:     STEPHEN LEGOMSKY

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Congressional Testimony

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2 Article

3

4

The original exhibits were retained by the court reporter  
to be attached to COUNSELS' transcripts.

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and

KARLA PEREZ, ET AL.,

STATE OF NEW JERSEY, )  

Defendant-Intervenors. )

13

14

15

16 THE DEPOSITION OF STEPHEN LEGOMSKY, produced,  
17 sworn, and examined on behalf of the Plaintiffs, August  
18 1, 2018, between the hours of eight o'clock in the  
19 forenoon and five o'clock in the afternoon on that day,  
20 at the offices of Alaris Litigation Services, 711 N.  
21 11th Street, St. Louis, Missouri 63101, before Rebecca  
22 L. Tuggle, a Registered Professional Reporter,  
23 Certified Court Reporter, and Certified Shorthand  
24 Reporter within and for the State of Missouri.

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Huseby Global Litigation

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1 MR. ROBINS: All right. So this is Jeffrey  
2 Robins for the federal defendants from the Department  
3 of Justice. And I just want to lay down the ground  
4 rules that I would prefer we use today given that the  
5 federal defendants do have concerns, as you may know,  
6 Mr. Legomsky, and certainly as the parties know, about  
7 testimony that you may give today that would call for  
8 the disclosure of information privileged, either under  
9 the attorney-client privilege or potentially  
10 deliberative process privilege or any other privileges  
11 that may apply. I would just ask that to the extent  
12 that any answer or testimony that you're going to  
13 provide today is based on or calls for the disclosure  
14 of communications, including advice or guidance that  
15 you gave to your clients or to the agencies, to either  
16 USCIS or DHS or other sub-components in your role as  
17 chief counsel of USCIS, or as counselor to the  
18 Secretary of Department of Homeland Security, that in  
19 the case that your testimony would call for the  
20 disclosure of that -- those forms of communication,  
21 the federal defendants assert that that would call for  
22 the disclosure of confidential or privileged  
23 information and would instruct that you not answer  
24 those questions and not disclose that information.  
25 Recognizing that there may be some questions where

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1 it's unclear of what capacity you're being called upon  
2 to answer them, if you could please clarify if you  
3 believe before you answer a question that the answer  
4 would call for the disclosure of such information,  
5 give federal defendants the opportunity to raise that  
6 objection, for the parties to potentially discuss the  
7 nature of that answer off the record and determine  
8 whether federal defendants will, in fact, object to  
9 such answer on the basis of privilege.

10 THE WITNESS: I understand.

11 MR. ROBINS: Thank you.

12 IT IS STIPULATED AND AGREED by and between  
13 counsel for the Plaintiffs and counsel for the  
14 Defendants that the deposition of STEPHEN LEGOMSKY may  
15 be taken in shorthand by Rebecca L. Tuggle, a  
16 Registered Professional Reporter, Certified Court  
17 Reporter, and Certified Shorthand Reporter, and  
18 afterwards transcribed into typewriting, and the  
19 signature of the witness is reserved by agreement of  
20 counsel and the witness.

21 PROCEEDINGS BEGAN AT 1:00 P.M.

22 \* \* \* \* \*

23  
24 STEPHEN LEGOMSKY,  
25 of lawful age, being produced, sworn, and examined on



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1 the part of the Plaintiffs, and after responding "Yes"  
2 to the oath administered by the court reporter, deposes  
3 and says:

4 EXAMINATION

5 QUESTIONS BY MR. DISHER:

6 Q Mr. Legomsky, good afternoon.

7 A Good afternoon.

8 Q Can you please introduce yourself to the  
9 court?

10 A Sure. I apologize in advance, I'm losing a  
11 little bit of my voice; so tell me if I need to pipe  
12 up. My name is Stephen Legomsky. S-t-e-p-h-e-n  
13 L-e-g-o-m, as in Mary, s-k-y.

14 Q Thank you, Mr. Legomsky. Mr. Legomsky, you  
15 are a law professor so I'll spare you some of the  
16 formalities about introducing the deposition process,  
17 but two things to point out. If you ever don't  
18 understand any of my questions, please let me know.  
19 Is that fair?

20 A Yes. Thank you.

21 Q And then if you ever need to take a break  
22 today, also just let me know and we'll take a break.  
23 But if there is a question pending on the table, I'd  
24 ask that you would answer that question before we take  
25 a break. Is that fair?

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1 Q Okay. Go ahead.

2 A And finally, for a brief period in 2015, I  
3 believe from July to October of 2015, I served as  
4 Senior Counselor to the Secretary of Homeland  
5 Security.

6 Q Okay. Going back to what we had talked  
7 about earlier, you can pull it up if you need to, but  
8 in Exhibit 4, you say -- again, you said that you were  
9 a member of the Obama Administration in a -- Let me  
10 start that over.

11 A I'm sorry. What page are we on?

12 Q Of course. Exhibit 4, page 339.

13 A Okay.

14 Q You said that you were a member of the Obama  
15 Administration integrally involved in the rollout and  
16 implementation of DACA; right?

17 A Yes.

18 Q And I don't want to ask you about any of the  
19 substance of the communications that you may have had  
20 in your role as chief counsel, okay? But I do want to  
21 ask you, can you give me a general sense about what  
22 your integral involvement was in the rollout and  
23 implementation of DACA?

24 A Yes. One of the things that the agency,  
25 USCIS, had to do after DACA was announced was refine

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1 some of the details. For example, which sorts of  
2 crimes would disqualify someone, what sorts of  
3 documentation should we require for proving that you  
4 meet the education requirements and those sorts of  
5 things.

6 MR. ROBINS: I just want to pause real fast  
7 and just to be clear that I would object to the extent  
8 that anything your -- your testimony now relates to  
9 anything that is deliberative in nature that didn't  
10 result in any final guidance or actions or relates to  
11 any specifics of the communications you had with  
12 regard to even both non-final and final guidance.

13 THE WITNESS: I appreciate that and I will  
14 be careful. The two examples I just gave, however,  
15 were both things that were, in fact, published and are  
16 still in the public domain.

17 So my role as chief counsel was to supervise  
18 those attorneys in my office who were working on these  
19 various issues from the legal side, as well as to  
20 participate in discussions with agency leadership and  
21 operational folks as to how this might be implemented.

22 Q (By Mr. Disher) Okay.

23 MS. PERALES: Just a caution. With respect  
24 to discussions or communications, you may want to keep  
25 in mind the privilege issue.

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1 testimony. I reviewed the memo that then USCIS  
2 Director Leon Rodriguez wrote to Senator Grassley in  
3 response to a request for information -- statistical  
4 information about DACA and advance parole.

5 I also read the more extended subsequent  
6 memo on that subject that Director Rodriguez also  
7 wrote in response to congressional inquiries. I  
8 reviewed the document that USCIS posted on its public  
9 website on approval and denial rates for DACA  
10 requesters.

11 There might have been other documents that  
12 are not coming to mind at the moment.

13 Q Okay. What was your methodology to reach  
14 the opinions that are disclosed in your declaration?

15 A It depends on the particular declarations.  
16 Some are based solely on my general knowledge of  
17 immigration law from both teaching and researching.  
18 Some other conclusions were based on the information  
19 that I gleaned from those public documents. Some were  
20 simply based on what I felt to be internal logic.

21 Q Okay. What specialized skill or expertise  
22 did you bring to bear in order to prepare this  
23 declaration?

24 A Well, again, my several decades of  
25 experience in the field of immigration law. My

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1 training and my legal education and my subsequent  
2 training, my research skills, and hopefully my  
3 analytical skills.

4 Q Okay. What fact issue do you think this  
5 declaration will help Judge Hanen decide?

6 A Without making the statement sound  
7 exclusive, one issue that comes immediately to mind is  
8 the fact question of whether USCIS adjudicators were,  
9 in fact, performing the discretionary case-by-case  
10 evaluation of individual DACA requests that the  
11 Secretary's memo explicitly instructed them to do  
12 so -- to do and that the standard operating procedures  
13 issued to the adjudicators requested them to do.

14 Q Any other fact issues you can think of? And  
15 take your time to look through it if you want.

16 A I would have to go through statement by  
17 statement. Do you have any specific statements in  
18 mind that I should focus on?

19 Q Well, can you -- I just want to see if you  
20 can point to any fact issues in here, other than, in  
21 your opinion, whether individual adjudicators  
22 exercised discretion.

23 A You'll have to give me a moment because  
24 there are --

25 Q Take your time, please.

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1           A     -- 40-something statements in this  
2     declaration. And you said factual determinations;  
3     right?

4           Q     Yes.

5           A     One factual assertion that runs through  
6     several of the statements is that the Department of  
7     Homeland Security is uniquely positioned by virtue of  
8     both its expertise and its delegation of authority  
9     from Congress to make the kinds of determinations on  
10    which the decision to announce DACA and the way in  
11    which they are implementing it. That's one.

12          Q     What sources did you rely on for your  
13    opinions related to that fact issue?

14          A     Partly the express delegation from Congress  
15    of the authority to the -- of the responsibility to  
16    the Secretary of Homeland Security to establish  
17    immigration enforcement policies and priorities.  
18    Partly through my own knowledge of the professionalism  
19    of the DHS employees. Partly from my own experience  
20    in knowing that the DHS employees are involved in  
21    these issues, bring, in most cases, many years of  
22    expertise to the subject.

23          Q     Okay.

24          A     Would you like me to continue going through  
25    it?

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1           Q     Okay. Keep going.

2           A     Yes, the other factual statements in  
3 paragraph 12, I would say the same thing about, that  
4 they come from published reports and that they are  
5 examples of facts that I would hope might be helpful  
6 to a court in assessing whether there was a rational  
7 basis for DACA.

8           Q     But in paragraph 12, the opinions you're  
9 expressing, you have not done any studies or reports  
10 yourself related to the issues detailed in paragraph  
11 12?

12          A     No. Except that with respect to the very  
13 last sentence of that paragraph, although I have not  
14 done a report, again, my exposure over the course of  
15 two years to DHS officials dealing with these issues  
16 enables me to see that these officials are uniquely  
17 well-positioned to balance the various policy factors.

18          Q     Okay.

19          A     The statement in paragraph 13 could be  
20 characterized as one of fact and so I think it's  
21 relevant to your question. And as to that, I believe  
22 the facts that USCIS and its predecessor agency abused  
23 both the prosecutorial discussion generally and  
24 deferred action, in particular, for many decades could  
25 help a decision-maker determine its legality today

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1 regulations," unquote. I point out there that they  
2 are not jumping the line.

3 Q And your opinion that they are not jumping  
4 the line is, again, based on the relevant immigration  
5 statutes and regulations?

6 A Yes. In paragraph 36, I make the point that  
7 most, if not all, of the criteria for DACA are ones  
8 that can easily be determined based solely on written  
9 documents and the background checks that the  
10 adjudicators perform. And that, therefore, personal  
11 interviews are seldom necessary or even particularly  
12 helpful. That could be relevant to Mr. Palinkas'  
13 assertion that the mere absence of a personal  
14 interview somehow renders the adjudication unreliable.

15 Looks like you're about to ask me something.

16 Q Yes. I'm thinking. Give me one second.  
17 What is the foundation for that opinion?

18 A I lay out the specific found -- the  
19 specifics of that foundation in paragraph 36 itself.  
20 I identify the specific DACA criteria and explain why  
21 each one is amenable to particular documentary  
22 evidence. For example, the person has to be under a  
23 certain age at the time of application and not over a  
24 certain age. Birth certificates provide that  
25 information.



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1 Q Okay.

2 A A person has to meet certain educational  
3 requirements. And documents from the educational  
4 institutions or from the Armed Services provide that  
5 information.

6 Q Do you think that the judge himself could  
7 look at those stated criteria and determine whether  
8 the criteria could be determined by simple factual  
9 determinations?

10 A I'm not sure what you mean by simple  
11 factual. Do you mean non-interview?

12 Q Yes.

13 A Yes, could. If the judge is aware of these  
14 facts.

15 Q Okay. And those facts are spelled out in  
16 the DACA memo itself?

17 A The facts as to what the criteria are are  
18 spelled out in the DACA memo. The required  
19 documentation is spelled out in other documents,  
20 including the standard operating procedures given to  
21 the adjudicators.

22 Q Okay. As well as the frequently-asked  
23 questions on USCIS's website?

24 A Correct.

25 Q Okay. But looking at those sources, the

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1 judge can make a determination for himself that these  
2 particular criteria could be determined solely on  
3 documentary evidence and not interviews?

4 A Yes.

5 Q Okay.

6 A I think paragraph 37 provides information  
7 that is available on the basis of public records, but  
8 which without specific mention might not be obvious to  
9 a judge. And, therefore, I think the observations  
10 contained in paragraph 37 could be helpful to a judge  
11 in understanding the implications of accepting  
12 Mr. Palinkas' theory that the lack of an interview  
13 renders the results unreliable.

14 Q So you pointed that information out to the  
15 judge?

16 A Yes.

17 Q And what about your specialized training or  
18 knowledge makes you uniquely qualified to point that  
19 information out to the judge?

20 A Well, I'm very familiar with the work that  
21 the USCIS service centers do and how that workload  
22 is -- how the USCIS workload is divided between those  
23 adjudicators and those who work in the field offices.

24 Q But if anybody went to this website that's  
25 cited here, they could also make that determination;

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1 right?

2 A If they knew of the website, yes.

3 Q Okay.

4 A Also in paragraph 37, I point out that many  
5 of the benefits that USCIS service center adjudicators  
6 decide are ones that are either ones that -- I need to  
7 rephrase.

8 Many of the things they adjudicate are  
9 either prerequisites to or applications for a formal  
10 legal status. That might not be obvious to a person  
11 who is not familiar with immigration law as a  
12 specialty.

13 Q But, again, all that information is  
14 available on the USCIS website?

15 A Not all of it. Some of it a person would  
16 have to know to go to the relevant parts of the  
17 statute and make those determinations, prerequisites  
18 to other benefits.

19 Q Okay. So it's either on the USCIS website  
20 or referenced in the statute?

21 A Correct.

22 Q Got it.

23 MS. PERALES: Before you do your next  
24 question, I know we're coming up on an hour. May we  
25 ask the court reporter to tell us how long we've been

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1 on the record?

2 REPORTER: An hour and 10 minutes.

3 MS. PERALES: Hour and ten. All right.

4 Would it be all right before you ask your next  
5 question?

6 Q (By Mr. Disher) Would you like a break?

7 A Sure.

8 MS. PERALES: Thank you.

9 (Whereupon, a brief break was taken.)

10 Q (By Mr. Disher) All right, Mr. Legomsky.  
11 We're back on the record and we were going through  
12 your declaration to identify the opinions on factual  
13 issues that you have given, and I believe we were on  
14 page 17. And so I just want to continue that and make  
15 our way through the rest of it to see what facts you  
16 offer opinions about.

17 A Well, in paragraph 38, I discuss the  
18 instructions given in the standard operating  
19 procedures for DACA adjudicators. And, in particular,  
20 the instruction that they carefully examine all cases  
21 of possible fraud based on the standard fraud  
22 protocols. That's very important to anyone who might  
23 be concerned that there is not enough attention given  
24 to possible fraud.

25 Q And that opinion is based on your review of

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1 the standard operating procedures?

2 A In part. It's based also on my ability to  
3 interpret the standard operating procedures and on my  
4 knowledge from having been at USCIS of how carefully  
5 the fraud adjudicators scrutinize these cases. I  
6 happen to know that they take them very seriously and,  
7 therefore, the factual information in paragraph 38 is  
8 probably more important than might meet the eye for a  
9 person who is not familiar with these processes.

10 Q And that is based on your personal  
11 observation of their process to review these  
12 applications?

13 A Yes.

14 Q How many --

15 A Based on -- I'm sorry. It's based on my  
16 general observations of the fraud officers at USCIS.

17 Q And that --

18 A Not -- not just -- sorry -- not just  
19 specifically DACA.

20 Q And that would have occurred during your  
21 stint from 2011 to 2013?

22 A Yes.

23 Q Okay. You have not observed any DACA  
24 adjudications since 2013?

25 A No.

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1           Q     Have -- no, that is correct, you have not  
2     observed -- Let me ask -- let me ask the question  
3     again.

4                     Since 2013, you have not observed any DACA  
5     adjudications; correct?

6           A     Correct.

7           Q     Okay. How many DACA applications have you  
8     personally adjudicated?

9           A     None.

10          Q     Okay. How many DAPA applications have  
11     people who report directly to you adjudicated?

12          A     None. The only people who reported to me  
13     were other attorneys, not adjudicators.

14          Q     All right. Keep going.

15          A     Paragraph 39 comments on the -- interprets  
16     and comments on the approval of denial -- wait,  
17     approval/denial rates for DACA and what that approval  
18     rate was. That's extremely important information for  
19     the issue of whether case-by-case adjudication is  
20     truly taking place.

21          Q     And that paragraph is based on data released  
22     by USCIS?

23          A     In part. That -- those data require some  
24     interpretation. For example, the figures for denials  
25     are accompanied by a footnote that also -- that says

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1 by denial, we need to include denials, terminations,  
2 and withdraws. I don't know that a person without  
3 expertise in immigration law or familiarity with the  
4 process would understand what terminations are. But  
5 they are, in effect, a form of denial. Something I  
6 know because of my expertise in immigration.

7 Q All right. And I was going to ask you about  
8 that later, but since we're on that point anyway, I  
9 can just give you a copy of this.

10 (Exhibit 6, DACA Statistics, were  
11 marked for identification.)

12 Q (By Mr. Disher) We'll mark this as Exhibit  
13 6. So this is the DACA statistics as of May 31, 2018.

14 A Okay.

15 Q And you've seen documents like this before?

16 A The most recent one I had seen was from  
17 March 31st, but yes.

18 Q Okay. Now, if we look at the second page,  
19 there's the column at the top for denied under case  
20 review?

21 A Yes.

22 Q And then that's -- there's a footnote to  
23 footnote number eight; right?

24 A Yes.

25 Q Okay. And then if we look at footnote

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1 number eight, it says the number of requests that were  
2 denied, terminated, or withdrawn during the reporting  
3 period; right?

4 A Correct.

5 Q Okay. So let's talk about each of those, in  
6 particular. When you say -- or rather when the  
7 footnote says requests that were denied, that would  
8 include requests that did not meet one or more of the  
9 stated criteria in the 2012 DACA memo; is that  
10 correct?

11 A Or that were denied in the exercise of  
12 discretion.

13 Q I understand. And I just want to make sure  
14 we cover the entire universe here, okay?

15 A Okay. I'm sorry. But, yes, it would  
16 include those.

17 Q So to -- and let's -- let's walk through it  
18 one by one. To put a fine point on it, in USCIS's  
19 reporting of these statistics about the DACA denials,  
20 the number of applications that are denied includes  
21 applications that did not meet one or more of the  
22 stated criteria in the DACA memo; correct?

23 A Correct.

24 Q It also included or includes, potentially,  
25 applications that met all of those criteria and then



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1     were denied anyway?

2             A     Correct.

3             Q     It also includes applications that were  
4     terminated?

5             A     Correct.

6             Q     And what does it mean for an application to  
7     be terminated?

8             A     Sometimes a DACA request is granted, but  
9     either the person subsequently does something that  
10    would have been a disqualification or evidence comes  
11    to light showing that a person had previously  
12    committed what should have been a disqualifying act  
13    and so the grant of DACA is terminated. In effect,  
14    it's a denial after the fact.

15            Q     Okay. Those terminations would occur  
16    because the applicant did something that then  
17    disqualified him or her from DACA eligibility?

18            A     Either that or the person had already done  
19    something, but the evidence of it did not come to  
20    light until after DACA had been granted.

21            Q     Understood. And then the number of denials  
22    also includes applications that were withdrawn?

23            A     Correct.

24            Q     What does it mean for an application to be  
25    withdrawn?

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1           A       Sometimes a person might withdraw an  
2       application when it becomes fairly clear that the  
3       application is going to be denied. An application  
4       might also be deemed withdrawn if a person leaves the  
5       country or if the person -- or if anything happens to  
6       cause the person to be ineligible for DACA, the  
7       application might be withdrawn.

8           Q       Okay. All right. Let's get back to your  
9       declaration. We were on paragraph 39.

10          A       Okay. If I could just finish the answer to  
11       that last question?

12          Q       Yes.

13          A       Those would be -- you were asking me whether  
14       this is information that would require a specialized  
15       expertise to understand, and as your questions  
16       indicate, it might not have been obvious to a  
17       non-specialist what terminations include or what  
18       withdrawals include. So interpretation of that  
19       important chart is something that I think benefits  
20       from the expertise that I have to offer.

21          Q       Where did you get the expertise that you're  
22       using to offer that opinion?

23          A       It's a combination of my own general  
24       knowledge from teaching and researching immigration  
25       law and from my familiarity with the DACA process from

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1 my time at USCIS.

2 Q Okay. Go ahead.

3 A Should I go on?

4 Q Yes, please.

5 A Paragraph 42 is formed partly by just common  
6 sense and logic. One would expect a person to be  
7 pretty sure DACA is going to be denied and who is  
8 undocumented not to apply for it. That's just  
9 instinctive. But in addition to that, over the years  
10 I've had many conversations with immigration  
11 practitioners who have dealt with DACA applicants.  
12 And it's clear from those consistent conversations  
13 that attorneys and other representatives simply  
14 counsel people not to apply if it's fairly clear they  
15 will be denied. That's something that I don't think I  
16 would have known but for both my expertise in the  
17 field and my interactions with many attorneys over the  
18 years.

19 Q Okay. Have you ever counseled anybody about  
20 applying for DACA?

21 A I have not.

22 Q Okay.

23 A In paragraph 46, in the portion that appears  
24 on page 20, one sentence a few lines down reads,  
25 "Further, only the leadership can disseminate guidance

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1 throughout the agencies so that people on the ground  
2 know what they are supposed to do, so that important  
3 priorities will be transparent to the public and so  
4 that there will be some reasonable degree of  
5 consistency," unquote. It's based partly on my  
6 experience at USCIS that I have come to understand the  
7 importance of centralized guidance to adjudicators and  
8 the fact that such guidance, in order to be  
9 meaningful, must come from agency leadership.

10 Q And that's based on your two years at USCIS?

11 A Yes.

12 Q Okay. And that's not something that's  
13 unique to USCIS?

14 A No, it's not. But even though it's not  
15 unique to USCIS, I don't know that that's the case  
16 with every agency. And so expertise and exposure  
17 enable me to know that that is particular to USCIS.

18 In paragraph 48, I say that, "There's no  
19 evidence to support any counter-instinctive assumption  
20 that the USCIS adjudicators who decide DACA requests  
21 are systematically disobeying the Secretary's multiple  
22 clear instructions to exercise discretion on a  
23 case-by-case basis," unquote. Impressed in that  
24 statement is that I am personally unaware of any  
25 evidence and I think that my exposure to USCIS is such

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1     that if there were any indication of that happening, I  
2     would absolutely have been aware of it.

3           Q     During the two years that you were at USCIS?

4           A     Correct.

5           Q     Have you reviewed any of the production from  
6     the federal defendants in this case?

7           A     No, I have not.

8           Q     Okay.

9           A     In the case of paragraph 49, some of the  
10    statements, or at least one of the statements, that  
11    the adjudicator has to struggle with determining how  
12    probable and how severe a danger has to be in order  
13    for a denial to be warranted, is based on my  
14    experience at USCIS and knowing how often that subject  
15    can come up. But I don't think I can comment on the  
16    specifics of those discussions without breaching  
17    privilege.

18          Q     Understood.

19          A     Okay.

20          Q     But, again, those discussions would have  
21    only occurred during the two years that you were at  
22    USCIS?

23          A     For those discussions, yes.

24          Q     Ending in 2013?

25          A     Yes.

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1 Q Okay.

2 A But I have to say, I can't think of any  
3 reason that that would change after I left.

4 In paragraph 50 -- no, I'm sorry, my  
5 mistake, paragraph 49. I discuss the fact that a  
6 decision that is discretionary in character does not  
7 become any less discretionary just because it goes to  
8 one of the criteria, rather than to a determination  
9 made after those criteria have been satisfied. I  
10 think my expertise in immigration law enables me to  
11 understand why those determinations are, in fact,  
12 discretionary.

13 Q Your expertise in immigration law leads you  
14 to that conclusion?

15 A Yes.

16 Q Which immigration laws, in particular?

17 A Immigration law, in general, because I --  
18 there are many, many provisions of the Immigration and  
19 Nationality Act that require adjudicators to exercise  
20 discretion in one form or another. Sometimes it's a  
21 very specific discretion, sometimes it's a more  
22 residual discretion.

23 Q And those areas are spelled out either in a  
24 statute or a regulation?

25 A The examples I'm thinking of are included in

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1 the statute, but it is not always clear, unless one is  
2 familiar with the case law, that those determinations  
3 are, in fact, discretionary.

4 Q Understand. So it's either a statute or  
5 regulation or case law?

6 A Yes. Case law --

7 Q Okay.

8 A -- and actual practice.

9 Q When you say "actual practice," what do you  
10 mean by that?

11 A By actual practice, if, for example, an  
12 adjudicator has to decide whether removal would result  
13 in, quote, "extreme hardship," unquote, which is a  
14 prerequisite to many forms of discretionary relief, it  
15 might not be obvious to someone that in order to  
16 determine extreme hardship, the person is doing a  
17 weighing and balancing, rather than looking for  
18 specific prerequisites. But knowing from -- knowing  
19 from the fact that this is done in practice, that  
20 these determinations require a weighing and a  
21 balancing, is something that I think might not be  
22 self-evident or non-specialized.

23 Q Okay. And what is the basis for your  
24 knowledge about the practice that an individual  
25 adjudicator goes through?

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1           A     Well, discussions of extreme hardship come  
2     up all the time.  Again, I can't reveal the specifics  
3     of those discussions without breaching confidence.

4           Q     And those discussions occurred during your  
5     stint at USCIS?

6           A     Yeah.  The ones I was referring to now  
7     occurred during my stint at USCIS.  But, in addition,  
8     there is always a lot of discussion among immigration  
9     scholars, a very sophisticated debate about how  
10    discretion -- how discretionary decisions are, in  
11    fact, made in immigration law.  There's been a great  
12    deal written, a tremendous body of scholarly  
13    commentary on that subject, and I think the  
14    familiarity with that commentary enables me to  
15    understand and hopefully to communicate how inherently  
16    discretionary these judgments really are, even if the  
17    statute doesn't use the specific word "discretion."

18          Q     Where are those scholarly publications  
19    published?

20          A     In law review articles, in books.

21          Q     Okay.

22          A     In reports, yeah.

23          Q     All right.  When you say "immigration  
24    scholars," are these immigration professors, for  
25    example?



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1           A     Typically, yes.

2           Q     Okay.

3           A     Sometimes practitioners, sometimes scholars.

4           Q     When you say "practitioners," you mean  
5 immigration lawyers?

6           A     Yes. People who -- yes, immigration  
7 lawyers. They might be in the private sector. They  
8 might be in the public sector.

9           Q     Okay.

10          A     But they're not professors.

11          Q     So it's either the immigration professors or  
12 the immigration lawyers who are debating this idea  
13 about how discretion is actually exercised?

14          A     How it is exercised and how you can tell  
15 whether a statutory delegation of responsibility is,  
16 in fact, discretionary in the first place.

17          Q     Thank you.

18          A     I think that's the end of my list.

19          Q     Okay. Let's talk about the conclusion  
20 briefly in paragraph 51. You say, "It is my  
21 firmly-held opinion that DACA is a case-by-case  
22 exercise of prosecutorial discretion by which DHS  
23 fulfills the Congressional directive to set and carry  
24 out immigration enforcement priorities."

25          A     Yes.

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1 the Secretary of Homeland Security has discretion to  
2 grant employment authorization to aliens based on this  
3 statute?

4 A Based both on this statute and on what the  
5 old INS, back in the days of the Reagan  
6 Administration, understood to be the general conferral  
7 of authority to the agency to implement and administer  
8 the immigration laws.

9 Q Okay. And --

10 A So it's a combination of both sources of  
11 authority.

12 Q And what was the second source again?

13 A In 1981 or 1982, the Reagan Administration,  
14 before the provision mentioned in paragraph 26 was  
15 enacted, asserted the authority to grant employment  
16 authorization to deferred action recipients. It did  
17 so by issuing a formal notice and comment rule  
18 specifically saying that deferred action recipients  
19 could qualify. It elaborated on its authority to do  
20 that in the federal registered notice accompanying the  
21 regulation. And the authority it cited was the  
22 general delegation of authority, from Congress to the  
23 Executive Branch, to administer the immigration laws.

24 Q All right.

25 A After that, this provision was enacted,

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1     thereby making explicit what the Reagan Administration  
2     had assumed was implicit.

3           Q     Okay. And the thing that it made explicit  
4     is that the executive has the authority to grant work  
5     authorization to aliens, even if a particular statute  
6     does not?

7           A     That's correct. More specifically, the  
8     Attorney General and now the Secretary of Homeland  
9     Security.

10          Q     Right. Are there any limits to the  
11     Secretary of Homeland Security's ability to do that?

12          A     There are no explicit limits in the statute  
13     itself. Undecided by the courts is whether there  
14     might be some implicit limit. No court that I'm aware  
15     of had occasion to decide that question so I would  
16     only be speculating.

17          Q     Okay. And I just want to know, in your  
18     opinion, as a retained expert for the intervenors in  
19     this case, is there a limit to the Secretary of  
20     Homeland Security's ability to grant work  
21     authorization to aliens?

22          A     My view is that there is an outside limit,  
23     but that this policy, DACA, does not even remotely  
24     approach that limit. The limit -- one limit that I  
25     would suggest, and I don't mean to imply there are no

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1 details of that without exposing that type of  
2 information, okay?

3 MR. ROBINS: Understood.

4 Q (By Mr. Disher) All right. So is there a  
5 special unit that looks at applications which may pose  
6 some national security threat?

7 THE WITNESS: May I answer that?

8 MR. ROBINS: I'm not objecting.

9 MS. PERALES: You follow his lead here.

10 THE WITNESS: Okay.

11 A If a case -- during the time I was there.  
12 And, again, I can speak only to that period. During  
13 the time I was there, if a national security issue  
14 arose, it would go straight to the -- it would go  
15 eventually to the director of the agency. Those cases  
16 would be taken very seriously and the director would  
17 want to know about them.

18 Q (By Mr. Disher) Understood. And then do you  
19 know who would make the ultimate decision about that?

20 A There would be a conversation between the  
21 director and whoever he wishes to consult.

22 Q Okay. While you were there, do you know how  
23 often that happened?

24 A No, I don't know the numbers.

25 Q Was it more than 10 times?

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1 MR. ROBINS: Objection. Again, on law  
2 enforcement privilege grounds.

3 MR. DISHER: Yeah, I just can't -- can I get  
4 an estimate from him?

5 MR. ROBINS: No.

6 Q (By Mr. Disher) What about the public safety  
7 decision, how many -- do you have any estimate about  
8 how many applications were initially flagged because  
9 they may pose some threat to public safety?

10 A I don't have an estimate as to that. I know  
11 that, according to the published statistics, as of the  
12 end of calendar year 2015, there were already  
13 approximately 75,000 denials of DACA on the merits.  
14 And my assumption would be the significant proportion  
15 of those were on public safety grounds, but I can't  
16 estimate what that proportion would be.

17 Q Okay. All right. In paragraph 50, you talk  
18 about the affidavit from Donald Neufeld.

19 A Yes.

20 (Exhibit 7, Neufeld Affidavit, was  
21 marked for identification.)

22 MR. DISHER: Mark that as Exhibit 7.

23 MS. PERALES: Seven?

24 MR. DISHER: Yes.

25 Q (By Mr. Disher) Now, you say, "The Neufeld

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1 reason to think it might be denied, you might not  
2 apply at all. And that's why I think the more  
3 successful applicants are those who apply at the  
4 beginning.

5 Q And I'm going to ask you to speculate, but  
6 might there be other scenarios by which individual --  
7 by which of these rates would increase over time the  
8 denial rates?

9 A Possibly a different administration, but the  
10 denial rates were continuing to increase even during  
11 the first few -- the last few years of the Obama  
12 Administration; so I don't think that would account  
13 for an increase. I can't offhand think of any other  
14 alternative explanation.

15 Q In preparing this declaration, have you done  
16 anything to exclude other possibilities?

17 A I can't identify any other possibilities to  
18 exclude.

19 MR. ROBINS: Okay. That's all I have. Pass  
20 the witness.

21 EXAMINATION

22 QUESTIONS BY MS. PERALES:

23 Q I have a few questions for you, Mr.  
24 Legomsky. With respect to differences between DAPA  
25 and DACA that you discussed with Mr. Disher, is it

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1 also fair to observe that the INA sets out provisions  
2 under which parents of U.S. citizen children may  
3 acquire an immigration status, but that the INA does  
4 not have analogous provisions for undocumented people  
5 brought to the U.S. as children?

6 MR. DISHER: Objection. Leading.

7 MS. PERALES: Yes.

8 Q (By Ms. Perales) Go ahead and answer.

9 A I think that is a fair argument because of  
10 the fact that in the original Texas versus U.S. DAPA  
11 case, if my recollection is correct, the Fifth Circuit  
12 did include as one of the reasons for rejecting DAPA,  
13 that the INA makes specific provision for certain  
14 classes of family members, but not all the ones  
15 included in DAPA. And as your question implies, the  
16 same could not be said of DACA; so I would say, yes,  
17 that is a fair argument to make.

18 Q You spoke a few moments ago about two  
19 exhibits today that represented two different drafts  
20 of your declaration. One is marked as Exhibit 5 and  
21 the other one is marked Exhibit 8 from the deposition.  
22 Can you just, in a brief sense, give us an  
23 understanding of the differences between those two  
24 drafts?

25 A Yeah. The main effect -- my main purpose in

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1 redrafting was that when I discovered that I had time  
2 for one more rigorous edit, I decided to take  
3 advantage of that opportunity and so I wanted to  
4 enhance the clarity and the specificity of the  
5 statements I had made, as well as to make the document  
6 a little bit cleaner by deleting information that I  
7 thought might be redundant. And so that was what I  
8 was trying to do in the second draft.

9 Q Okay. You spoke to Mr. Disher through a  
10 series of questions and answers about the possible  
11 legal limits of the authority of DHS to grant work  
12 authorization to a very large number of undocumented  
13 immigrants. And I was hoping that you would be able  
14 to summarize the different limitations that you  
15 identified in that colloquy in the answer to my  
16 question.

17 A Certainly. And these are simply limitations  
18 that I can think of. I don't want to exclude the  
19 possibility that there are still other limitations,  
20 but the ones that come most readily to mind are,  
21 first, the resource limitations rationale takes you  
22 only so far. There might be a certain point at which  
23 the resources are available to remove a far greater  
24 number than what the administration is removing, and  
25 there could at least be an argument that by not fully



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1 using the enforcement resources, the administration is  
2 not acting consistently with the congressional intent  
3 in passing the various Appropriations Act. That's  
4 one.

5 Secondly, the particular priorities that the  
6 administration uses in deciding whom to focus on and  
7 whom not to focus on need to be -- need to have some  
8 rational basis.

9 Third, they cannot violate Equal Protection;  
10 so they cannot draw their priorities along lines that  
11 would violate the Equal Protection Clause.

12 And fourth, the particular priorities, in my  
13 view, cannot come into direct conflict with priorities  
14 that Congress has explicitly ordered the  
15 administration to take into account.

16 Again, there might be still others that are  
17 not coming readily to mind.

18 Q Okay. And then for my last set of questions  
19 to you, I'd like you to turn to your declaration dated  
20 July 16, which is Legomsky Deposition Exhibit No. 5.

21 A Okay.

22 Q You identified some statements of fact in  
23 the declaration with Mr. Disher and I'd like to go  
24 over some additional fact statements with you that may  
25 have been left out.

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1                   So with respect to page 3, paragraph 5, can  
2     you identify for me the fact statements in that  
3     paragraph?

4           A     Well, certainly the first sentence is a  
5     statement of fact. "DHS routinely establishes  
6     priorities guiding its exercise of prosecutorial  
7     discretion in the enforcement of the immigration  
8     laws."

9                   The second statement is also one of fact,  
10    that deferred action is one of the instruments it uses  
11    for this purpose. The third statement could be  
12    characterized as one of fact, that deferred action is  
13    one particular -- I'm sorry -- that DACA is one  
14    particular deferred action initiative.

15          Q     And with respect to the facts that you set  
16    out in paragraph 3 of your declaration, can you  
17    explain to us what you drew upon to state those facts  
18    as being true?

19                   MR. DISHER: I'm sorry. You mean paragraph  
20    5.

21          Q     (By Ms. Perales) I'm sorry. Page 3,  
22    paragraph 5. I'm sorry. I apologize.

23                   With respect to the fact statement on page  
24    3, paragraph 5, can you explain what you drew upon to  
25    make those factual statements?

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1           A       Well, as to the first sentence, I  
2       specifically drew on my general expertise in  
3       immigration law and my experience from teaching, from  
4       researching, from lots and lots of conferences and  
5       conversations with other immigration scholars, with  
6       lots of conversations over the years with immigration  
7       practitioners and with other experts. I know that it  
8       is very routine for DHS to establish priorities and  
9       also for meeting the various documents in which they  
10      have done precisely that.

11          Q       And with respect to paragraph 5, did you  
12      also draw on your experience as USCI -- working with  
13      the Federal Government with DHS?

14          A       Yes, I should have added that as well. That  
15      certainly informs my knowledge as to the first  
16      sentence and with respect to the second and third  
17      sentences in that paragraph as well.

18          Q       And then with respect to paragraph 6, in the  
19      first sentence, "DACA is a decision by the agency to  
20      defer action (immigration enforcement proceedings)  
21      against an individual." Can you describe for me what  
22      you drew upon to make that fact statement?

23          A       Again, my general expertise derived from the  
24      sources that I described a moment ago.

25          Q       Okay. With respect to paragraph 7, which

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1 begins at the bottom of page 3, can you identify fact  
2 statements in that paragraph?

3 A Yes. Yes. The entire paragraph is a  
4 statement of fact. It describes what DHS has to do  
5 when it makes decision not to bring enforcement  
6 proceedings.

7 Q And specifically the listing of the factors  
8 that DHS balances, can you describe for me what you  
9 drew upon to make that fact statement?

10 A The same as before. My general expertise  
11 from many decades of experience, plus my service time  
12 at USCIS.

13 Q With respect to page 4, paragraph 9, can you  
14 identify any fact statements in that paragraph?

15 A Certainly the first sentence is a statement  
16 of fact. The second statement as well. And the third  
17 statement as well. I'm sorry. The third sentence as  
18 well.

19 Q And what did you draw upon to make those  
20 fact statements?

21 A The same. My general expertise, plus my  
22 time at USCIS.

23 Q Okay. With respect to paragraph 11, which  
24 begins at the bottom of page 4, can you identify your  
25 fact statements there?

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1           A     All of the statements in paragraph 11 I  
2     would describe as statements of fact.

3           Q     And what did you draw upon to make those  
4     fact statements in paragraph 11?

5           A     The same. My general expertise in  
6     immigration law and my time at USCIS.

7           Q     At the bottom of page 5 where paragraph 15  
8     begins -- I think you covered this one with Mr. Disher  
9     so I'll move on.

10          A     Yes.

11          Q     With respect to paragraph 16 and the  
12     statements in paragraph 16, on what did you base your  
13     statement that in some instances, the beneficiaries  
14     tended to be those with a bridge to some form of legal  
15     status?

16          A     Partly on the basis of what I've described  
17     before, my general expertise. But in addition to  
18     that, by examining summaries of the occasions on which  
19     prior presidents have granted relief to large  
20     number -- large categories of undocumented immigrants.

21          Q     And upon what do you base your statement in  
22     the following sentence, quote, "DACA too serves as  
23     such a bridge because many current DACA recipients are  
24     eligible to adjust as they grow older and marry,"  
25     unquote?

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1           A     I base that on -- again, on my general  
2     knowledge of immigration law, but also on the specific  
3     terms of DACA. I'll leave it at that.

4           Q     Because of your background in immigration  
5     law and experience at USCIS, are you familiar with the  
6     methods by which an individual may be able to gain  
7     legal permanent resident status?

8           A     Yes, I am.

9           Q     And are those provisions in the INA  
10    standalone or must they be interpreted in the context  
11    of other provisions?

12          A     They absolutely have to be interpreted in  
13    the context of many other provisions. In fact, I  
14    should add that that last sentence applies to many of  
15    the factual determinations that I've identified  
16    earlier. Expertise is critical in these cases, not  
17    only for the purpose of ferreting out individual  
18    pieces of information as I've described in the  
19    declaration, but perhaps even more importantly,  
20    piecing it all together.

21                The Immigration and Nationality Act, as  
22    specialists know, contain many, many provisions that a  
23    person would not ordinarily discover by looking only  
24    at the part of the INA in which one provision appears.  
25    It's very common to read a provision of the INA and

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1 not know that 200 pages later, there's another  
2 provision that qualifies it. So being able to  
3 understand how all these pieces fit together with each  
4 other and how they fit together with various factual  
5 statements that I've been identifying requires a good  
6 deal of experience and specialized expertise.

7 Q And do you have that experience and  
8 expertise?

9 A I do.

10 Q Moving forward to page 9, paragraph 22 at  
11 the bottom of the page, can you tell me what you base  
12 the fact statements in paragraph 22 upon when you made  
13 them?

14 A On general expertise and on examination of  
15 the specific provisions of the statute and provisions  
16 of the regulations that are cited in that paragraph.

17 Q On page 10, paragraph 25, upon what did you  
18 base your fact statements in paragraph 25?

19 A The first statement is based on general  
20 expertise and, in particular, on being able to see  
21 patterns of grants of preferred action or its function  
22 of equivalence over the years. The same is true of  
23 the second sentence. And the third sentence is based  
24 both on the information that I've just described and  
25 on examination of the particular statutory provisions

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1 and provisions of the regulations on which those  
2 benefits are specifically based.

3 Q Are favorable exercise of discretion  
4 sometimes also embodied in memoranda or procedure  
5 documents at DHS?

6 A Yes, they are.

7 Q And would one require a familiarity with  
8 those memoranda and procedure documents in order to be  
9 able to present the full context of deferred action in  
10 similar exercises of discretion?

11 A I would say, yes, that would be  
12 indispensable.

13 Q And do you have that familiarity?

14 A Yes, I do.

15 Q On page 14, paragraph 33, the very beginning  
16 of the paragraph begins with the words, quote,  
17 "Understanding the effects of advance parole on DACA  
18 recipients," unquote. Do you see that there?

19 A Yes.

20 Q Do you understand the effects of advance  
21 parole on DACA recipients?

22 A I do.

23 Q And upon what do you draw when you convey  
24 your understanding of the effects of advance parole on  
25 DACA recipients?



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1           A     My general knowledge, plus my understanding  
2     of how several different provisions of the INA work  
3     together and on the basis of the experience I accrued  
4     at USCIS.

5           Q     Does understanding the effects of advance  
6     parole on DACA recipients require an understanding of  
7     the routes by which an individual is able to adjust  
8     status under the INA?

9           A     Yes.

10          Q     Does it also require an understanding of  
11     inadmissibility?

12          A     Yes, absolutely.

13          Q     Does it require an understanding of the  
14     three and ten-year bars?

15          A     Yes.

16          Q     Does it require an understanding of other  
17     barriers to adjustment of status that may be located  
18     elsewhere in the INA?

19          A     Yes.

20          Q     With respect to paragraph -- page 15,  
21     paragraph 34, when you talk about this concept of  
22     jumping the line, upon what do you base that -- those  
23     statements in paragraph 34?

24          A     During the time that I was at USCIS, I know  
25     that advance parole -- I'm sorry -- I know that

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1 adjustment of status applications by people who had  
2 received DACA and who had later received advance  
3 parole were handled in the same way and all other  
4 people in the same immigration category and in the  
5 same order. So, for example, if you were applying for  
6 adjustment of status based on being an immediate  
7 relative of a U.S. citizen, there are no statutory  
8 numerical limits and, therefore, the only waiting time  
9 is processing time. There was no provision for  
10 putting the DACA recipients ahead of the line of  
11 people who were otherwise similarly situated.

12 Q And does your familiarity with this topic of  
13 "the line," quote, unquote, include familiarity with  
14 the availability of Visas, permanent resident Visas,  
15 for different categories of individuals seeking to  
16 adjust status?

17 A Yes, very much so.

18 Q And what is that based on? What is your  
19 familiarity based on there?

20 A General knowledge of the Immigration and  
21 Nationality Act and particularly how these numerous,  
22 extremely complex statutory provisions work together.

23 MS. PERALES: I pass the witness.

24

25

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1 EXAMINATION

2 QUESTIONS BY MR. DISHER:

3 Q Mr. Legomsky, a few follow-up questions.

4 First, you mentioned piecing it all  
5 together; right?

6 A Yeah.

7 Q You don't dispute that Judge Hanen himself  
8 can piece it all together without your help, do you?

9 A I think that to reach a reliable decision,  
10 anyone who is not an immigration specialist would need  
11 the guidance of someone who understands the intricate  
12 network of statutory and regulatory provisions and  
13 case law that these decisions require. I spend an  
14 entire semester immersed in teaching the students the  
15 complexities of immigration law. And I would be very  
16 wary of anyone who is not a specialist making these  
17 decisions without input from a specialist.

18 Q That specialist could be a lawyer for one of  
19 the parties in the case?

20 A It could be if the lawyers are specialists  
21 in immigration law.

22 Q Okay.

23 A Otherwise, I think it would be unreliable.

24 Q Going back to the idea of the outer limit of  
25 the executive's ability to grant work authorization,

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1 REPORTER CERTIFICATE

2 I, REBECCA L. TUGGLE, a Registered  
3 Professional Reporter, Certified Court Reporter, and  
4 Certified Shorthand Reporter within and for the State  
5 of Missouri, do hereby certify that there came before  
6 me on August 1, 2018, at Alaris Litigation Services,  
7 711 N. 11th Street, St. Louis, Missouri 63101

8 STEPHEN LEGOMSKY

9 who was by me first duly sworn; that the witness  
10 was carefully examined; that said examination was  
11 reported by myself, translated and proofread using  
12 computer-aided transcription; and the above transcript  
13 of proceedings is a true and accurate transcript of my  
14 notes as taken at the time of the examination of this  
15 witness.

16 I further certify that I am neither attorney  
17 nor counsel for nor related nor employed by any of the  
18 parties to the action in which this examination is  
19 taken; further, that I am not a relative or employee of  
20 any attorney or counsel employed by the parties hereto  
21 or financially interested in this action.

22 Dated this 2nd day of August, 2018.

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Becca Tuggle

Rebecca L. Tuggle, RPR, CCR, CSR